Court File No. CV-19-615862-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP.

Applicant

WRITTEN ARGUMENT OF PRICEWATERHOUSECOOPERS INC., IN ITS CAPACITY AS RECEIVER OF JTI-MACDONALD TM CORP.

TORYS LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, Ontario M5K 1N2
Fax: 416.865.7380

Scott Bomhof (LSO#: 37006F)
Tel: 416.865.7370
Email: sbomhof@torys.com

Adam M. Slavens (LSO#: 54433J)
Tel: 416.865.7333
Email: aslavens@torys.com

Lawyers for JT Canada LLC Inc. and PricewaterhouseCoopers Inc., in its capacity as receiver of JTI-Macdonald TM Corp.

Court File No. CV-19-615862-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP.

Applicant

WRITTEN ARGUMENT OF PRICEWATERHOUSECOOPERS INC., IN ITS CAPACITY AS RECEIVER OF JTI-MACDONALD TM CORP.

1. JTI-Macdonald TM Corp. ("TM") is a wholly-owned subsidiary of the Applicant. TM is not a party to any of the litigation involving the Applicant and is not a party to these CCAA proceedings.

> Affidavit of Robert McMaster dated March 8, 2019 (the "McMaster Filing Affidavit"), paras. 14 and 15
> Receiver's Compendium, Tab 1

2. TM owns many of the trademarks used in the Applicant's business. TM licenses the trademarks to the Applicant pursuant to a Trademark License Agreement dated October 8, 1999, as amended from time to time (the "Trademark Agreement"). Following the Applicant's default under loan agreements between TM and the Applicant, the parties negotiated amendments to the Trademark Agreement in January of 2018 which required the Applicant to provide a deposit in the amount of $1.33 million (the "Deposit") against obligations under the Trademark Agreement which could be set-off in the event of a failure to pay.

> McMaster Filing Affidavit, paras. 28-29
> Receiver's Compendium, Tab 2

3. TM is also the largest secured creditor of the Applicant. The Applicant is indebted to TM in the amount of approximately $1.2 billion pursuant to secured debentures which mature on November

18, 2024 (the "TM Security"). The Monitor in these proceedings has determined, subject to certain assumptions and qualifications, that the TM Security is a valid and enforceable obligation of the Applicant.

Report of the Proposed Monitor dated March 8, 2019 (the "Pre-Filing Report"), paras. 28-31
Receiver's Compendium, Tab 3

4. TM is currently under the management and supervision of a privately-appointed receiver and manager. PricewaterhouseCoopers Inc. was appointed as receiver and manager of TM (the "TM Receiver") by JT Canada LLC (the "ParentCo") on July 9, 2015 following TM's default under its credit facilities with ParentCo. At the time of the Receiver's appointment, all of the directors of TM resigned. As a result, the Applicant does not exercise control over TM.

McMaster Filing Affidavit, para. 15
Receiver's Compendium, Tab 4

5. The use of the trademarks licensed to the Applicant under the Trademark Agreement are vital to the Applicant's business and if the right to use the trademarks was terminated it would likely lead to the cessation of the Applicant's business.

McMaster Filing Affidavit, para. 31
Receiver's Compendium, Tab 5

Affidavit of Robert McMaster dated April 1, 2019 (the "McMaster Reply Affidavit"), para. 33
Receiver's Compendium, Tab 6

6. At the time of the commencement of these proceedings, the Applicant owed approximately $1 million in royalty payments under the Trademark Agreement.

McMaster Filing Affidavit, para. 70
Receiver's Compendium, Tab 7

7. The Receiver supported the initial application and consented to the Charges created by this Court ranking in priority to the TM Security on the basis that the Applicant intended to continue to

make normal course payments under the Trademark Agreement and interest payments under the TM Security during these proceedings.

McMaster Filing Affidavit, paras. 93 and 98
Receiver's Compendium, Tab 8

8. TM has no source of revenue other than the payments made by the Applicant pursuant to the Trademark Agreement and the TM Security. TM has ongoing expenses, including tax obligations to Canada Revenue Agency ("CRA"), which continue to accrue whether or not the Applicant pays the amounts owing to TM. As noted by Robert McMaster in his Reply Affidavit;

> "[w]ithin the next few months, neither of these entities [TM and Parentco] will have sufficient funds to pay their outstanding taxes... TM would require financing in the amount of $2.3 million in 2019 which would grow to $54.5 million in 2023".

McMaster Reply Affidavit, paras. 35 and 38
Receiver's Compendium, Tab 9

9. The royalties paid to TM under the Trademark Agreement have been reviewed for compliance against a transfer pricing trademark royalty study and are reviewed by the CRA on a regular basis. No amendments have been requested and no issues have been raised as a result of these reviews. The Trademark Agreement has not been set aside in this proceeding or any other proceeding and is not subject to any outstanding court challenge.

Affidavit of William Aziz sworn April 1, 2019 (the "Aziz Reply Affidavit"), paras. 22 and 26
Receiver's Compendium, Tab 10

10. On March 19, 2019, this Court heard an application brought by the Quebec Class Action Plaintiffs (the "QCAPs") seeking an order suspending paragraphs 8(c) and 8(d) of the Initial Order of Mr. Justice Hainey (the "Initial Order"). Paragraphs 8(c) and 8(d) of the Initial Order authorized the Applicant to pay "all interest due and payable on the Applicant's secured obligations" [8(c)] and "payment for goods or services supplied or to be supplied to the Applicant (including the payment of any royalties or shared services)" [8(d)]. No relief was sought by the QCAPs with respect to the Deposit.

Motion Record of QCAPs dated March 15, 2019
Receiver's Compendium, Tab 11

11. On March 19, 2019, this Court issued reasons which ordered the suspension of the payments set out in Exhibit "DD" of the McMaster Filing Affidavit, which includes the royalty payments under the Trademark Agreement. The Applicant has made no payments to TM under the Trademark Agreement since the commencement of these proceedings in accordance with that order.

> Endorsement of the Honourable Mr. Justice McEwen dated March 19, 2019 (the "March Endorsement")
> Receiver's Compendium, Tab 12

12. TM has ongoing costs and expenses, including the payment of income tax. We have been advised by counsel to the Applicant that the issue of intercompany payments will be addressed by the Hon. Warren K. Winkler, Q.C., as part of the mediation of the 3 tobacco restructurings, but that the timing for these issues to be addressed is currently unknown. TM has no other source of revenue to fund its own expenses.

13. In May, counsel for the Receiver wrote to the Monitor's counsel to advise them that the Receiver intended to apply the Deposit against the royalties owing under the Trademark Agreement. The Receiver's counsel asked the Monitor's counsel to advise if they had any questions about this course of action.

14. In June, upon being advised that the Deposit would first be applied against the pre-filing liabilities, the Monitor's counsel advised that the Monitor had no objection to the Receiver applying the Deposit against the outstanding royalties.

15. No action was taken with respect to the Deposit until the Monitor's counsel was consulted and confirmed that it did not object.

16. The Receiver strongly objects to the QCAPs' allegation that the Receiver violated the March Endorsement or acted in a manner that warrants sanction of this Honourable Court. The March Endorsement did not prohibit the application of the Deposit against outstanding royalties, nor was such relief requested by the QCAPs.

17. At the hearing of the QCAP's motion, this Honourable Court was specifically advised that if ongoing payments under the Trademark Agreement were suspended, that the Receiver would apply the Deposit against such royalties:

> "JTIM vigorously opposes the relief sought primarily submitting as follows:
>
> . . .
>
> if pre-filing royalties are not paid they will be deducted from a deposit held by TM";
>
> March Endorsement, para. 9
> Receiver's Compendium, Tab 15

18. On or about April 25, 2019, this Honourable Court issued the Second Amended and Restated Initial Order in these proceedings (the "Second Restated Initial Order"). Pursuant to paragraph 24 of the Second Restated Initial Order, notwithstanding anything else in the Second Restated Initial Order, no Person is prohibited from requiring immediate payment for the use of leased or licensed property and rights set out in the CCAA are expressly preserved. The Receiver expressly relies on ss. 11.01(a) and 21 of the CCAA, which provide:

> 11.01 No order made under section 11 or 11.02 has the effect of:
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made.
>
> 21. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.
>
> Second Restated Initial Order, para. 24
>
> CCAA, ss. 11.02(a) and 21
>
> Receiver's Compendium, Tab 16

19. The Receiver confirmed that each of the Applicant and the Monitor did not object to the proposed course of action before taking any steps with respect to the Deposit. The Deposit was provided to the Receiver prior to the March Endorsement and nothing in the March Endorsement or the Second Restated Initial Order prohibits the Receiver from applying the Deposit against the outstanding royalties under the Trademark Agreement. To the contrary, the Second Restated Initial Order and the CCAA preserves the Receiver's right to require immediate payment for the use of the licensed trademarks and set-off the Deposit against unpaid royalties. The Applicant and the Monitor

have each advised the Court that they do not object to the use of the Deposit in a transparent and open manner. There is no basis for the QCAPs to seek the Court's sanction of the activities of the Receiver and it is respectfully submitted that the relief requested in paragraph 1(d) of the QCAPs' Motion should be dismissed.

TORYS LLP

Counsel to PricewaterhouseCoopers Inc. in its capacity as Receiver of JTI-Macdonald TM Corp.

Scott Bomhof (LSO #37006F)
Adam Slavens (LSO #54433J)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP.

Applicant

Court File No. CV19-615862-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

WRITTEN ARGUMENT OF PRICEWATERHOUSECOOPERS INC., IN ITS CAPACITY AS RECEIVER OF JTI-MACDONALD TM CORP.

Torys LLP
Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario M5K 1N2
Fax: 416.865.7380

Scott Bomhof (LSO#: 37006F)
Tel: 416.865.7370
Email: sbomhof@torys.com

Adam M. Slavens (LSO#: 54433J)
Tel: 416.865.7333
Email: aslavens@torys.com

Lawyers for JT Canada LLC Inc. and PricewaterhouseCoopers Inc., in its capacity as receiver of JTI-Macdonald TM Corp.